Baby Watson Cheesecake, Inc. *and* Local 810, International Brotherhood of Teamsters, AFL–CIO and Retail, Wholesale, Warehouse and Production Employees International Union, Party in Interest. Cases 2–CA–26479 and 2–CA–27450

January 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 2, 1995, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed an exception.

The National Labor Relations Board has considered the decision and the record in light of the exception and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Baby Watson Cheesecake, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

''(c) Post at its New York, New York facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

[1] The General Counsel excepts only to the judge's failure to include in the recommended Order a provision providing that the notice to employees be posted in both English and Spanish. It appears from the record that at least some of the employees are primarily Spanish-speaking. The Respondent has not responded to the General Counsel's exception. We find merit to the General Counsel's exception and shall order that the notice be posted in both English and Spanish. See *Caribe Staple Co*., 313 NLRB 877 (1994).

Kevin Smith, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollack, P.C.), for the Respondent.
Eric Greene, Esq., for the Charging Party.
Larry M. Cole, Esq. (Cole & Cole, Esqs.), for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of charges filed on April 22, 1993, and on May 16, 1994, by Local 810, International Brotherhood of Teamsters, AFL–CIO (the Union or Local 810) complaints and notices of hearing were issued on September 16, 1993, and July 26, 1994, respectively, against the Respondent in Case 2–CA–26479 and Case 2–CA–27450, respectively, alleging that the Respondent violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act). By answers timely filed by the Respondent and the Party in Interest, Retail, Wholesale, Warehouse and Production Employees International Union (RWWPE) denied the material allegations in the complaints. By order dated November 29, 1994, these cases were consolidated for the purpose of hearing.

The hearing in these consolidated cases was held on November 30, 1994, in New York, New York. Subsequent to the close of the hearing, and in lieu of formal briefs, the General Counsel and the Respondent submitted letters in support of their respective positions regarding the issues present in these consolidated cases.

On the entire record and the letters of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a domestic corporation with an office and place of business at 601 West 26th Street, New York, New York, has been engaged in the retail and nonretail business of baking and distributing Baby Watson Cheesecakes. Annually, in the course of its business operations, the Respondent has purchased and received products, goods, and materials at its place of business valued in excess of $50,000 directly from points located outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Local 810, International Brotherhood of Teamsters, AFL–CIO and Retail, Wholesale, Warehouse and Production Employees International Union are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaints allege, in substance, that the Respondent violated Section 8(a)(1), (2), and (3) of the Act, by promising employees better benefits if they signed authorization cards for RWWPE, threatened that the employees' support of Local 810 was futile because the Respondent would never sign a contract with that Union, rendered assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE, threatened employees with unspecified reprisals and being reported to the Respondent's president if they refused to sign authorization cards for RWWPE, and by suspending employee Leon Garcia for 3 days because he refused to sign an authorization card for RWWPE. The Respondent denied these allegations.

A. *Prior Proceedings*

In 1985, when the Respondent began its business operations, it employed six or seven workers. Mario D'Aiuto, president and owner of Baby Watson Cheesecake, Inc., signed a collective-bargaining agreement with RWWPE. As the Respondent rapidly expanded its business the number of employees increased to 50 by October 1991. However, as the Respondent grew, D'Aiuto failed to report the names of new employees to RWWPE and did not remit dues to the Union on their behalf. In fact, as of October 1991, employees were unaware that the Respondent had a relationship with any union.

During October 1991, employee Leon Garcia contacted Local 810 whereupon this Union commenced an organizing campaign, seeking to represent the Respondent's employees in an appropriate unit.[1] After obtaining signed authorization cards from 35 of 46 unit employees, Local 810 requested that D'Aiuto recognize it as the exclusive bargaining representative of the Respondent's employees in the appropriate unit. D'Aiuto refused to sign the recognition agreement and thereafter began an effort to coerce employees into signing authorization cards for RWWPE, threatening to discharge them if they did not do so. Additionally, D'Aiuto's son, Luca D'Aiuto, repeatedly told employees that the Respondent would never sign a collective-bargaining agreement with Local 810, even if it meant having to close the factory. Luca D'Aiuto and another employee warned employees that they would not be permitted to work unless they signed an authorization card for RWWPE. Soon thereafter the Respondent signed another collective-bargaining agreement with RWWPE.

On March 13, 1992, United States District Court Judge Leonard B. Sand issued a preliminary injunction under Section 10(j) of the Act, directing that the Respondent recognize and bargain with Local 810 and cease recognizing and honoring its collective-bargaining agreement with RWWPE. See *Silverman ex rel. NLRB v. Baby Watson Cheesecake*, No. 92 Civ. 799, 1992 U.S. Dist. LEXIS 3027 (S.D.N.Y. Mar. 13, 1992).

In April 1992, the Respondent and Local 810 commenced negotiations for a collective-bargaining agreement. The parties were unable to reach an agreement, and no negotiations occurred after April 19, 1993. The Respondent alleges that in April 1993 it received objective evidence, in the form of a demand for recognition together with executed authorization cards from RWWPE, that Local 810 no longer represented a majority of the Respondent's employees and therefore the Respondent ''lawfully ceased bargaining with Local 810.''

On June 4, 1992, following a hearing held on March 16, 1992, Administrative Law Judge Steven Davis issued a decision, 309 NLRB 417 (1992), in which he concluded that the Respondent had violated Section 8(a)(1), (2), (3), and (5) of the Act, by threatening employees with discharge if they did not sign an authorization card for RWWPE; by threatening to close its factory rather than recognize Local 810; by threatening to close its factory if employees selected Local 810 as their collective-bargaining representative; by threatening to and withholding employee paychecks when employees refused to sign an authorization card for RWWPE; by promising to pay employees' dues owed to RWWPE; by threatening to terminate and permanently replace unfair labor practice strikers; by granting recognition to RWWPE and entering into a collective-bargaining agreement with it containing a union-security clause, and implementing such clause; by deducting dues for RWWPE from its employees paychecks without having an uncoerced employee authorization therefor; and by refusing to recognize and bargain with Local 810.

Based on the above, Judge Davis recommended that the Respondent be ordered to withdraw recognition from RWWPE and to recognize and bargain with Local 810. On November 9, 1992, the Board adopted Administrative Law Judge Davis' decision and recommended Order. *Baby Watson Cheesecake, Inc*., supra. On May 3, 1993, the United States Court of Appeals for the Second Circuit issued a judgment enforcing the Board's Order.

In January 1994, the Respondent once again withdrew recognition from Local 810, asserting that it had a good-faith doubt that Local 810 continued to represent a majority of its employees in the bargaining unit. The Respondent then extended recognition to RWWPE in late January or early February 1994. Pursuant to an order of the United States Court of Appeals for the Second Circuit dated February 22, 1994, as clarified on March 28, 1994, the court referred the Board's petition for a finding that the Respondent was in contempt of the court's judgment entered May 3, 1993, to the chief judge of the United States District Court for the Southern District of New York for the designation of a judge or magistrate to file recommendations with the Second Circuit Court. Chief District Court Judge Griesa referred the case to Chief Magistrate Judge Naomi Reice Buchwald on March 2, 1994. (Case 93–4023.)

An evidentiary hearing was held on July 13, 1994, before Chief Magistrate Judge Buchwald and thereafter, on September 21, 1994, she issued her ''Recommended Findings of Fact and Conclusions of Law.''[2] Judge Buchwald recommended that the Respondent be held in civil contempt for recognizing and bargaining with RWWPE and for failing and refusing to bargain with Local 810 in direct contravention of the judgment of the Court of Appeals for the Second Circuit entered on May 3, 1994. Furthermore, I take judicial notice of the order of the Court of Appeals for the Second Circuit, dated February 1, 1995, in Case 93–4023, adopting the recommended findings of fact and conclusions of law of Chief

[1] The evidence indicates that the following is the appropriate bargaining unit: All production and maintenance employees and shipping employees of the Respondent employed at its facility, excluding all clerical employees and guards, professional employees, and supervisors as defined in the Act.

[2] The parties stipulated to include in the record of the instant case, the entire record made in the contempt proceeding case before Chief Magistrate Judge Buchwald and including her recommended findings of fact and conclusions of law, the Respondent's appeal of Judge Buchwald's decision set forth in its letter to the Court of Appeals Second Circuit dated October 31, 1994, and the General Counsel's response thereto. Moreover, both the Respondent and the General Counsel agree that Judge Buchwald's findings of fact concerning the events of March 1993 through January 1994, encompasses a complete account of events occurring during this period and are conclusive. The Respondent's counsel specifically noted at the hearing that the Respondent does not contest or dispute Judge Buchwald's findings of fact. ''It is only her Conclusions of Law that we contest.''

Magistrate Judge Buchwald and finding the Respondent in civil contempt for refusing to recognize and bargain with Local 810, instead recognizing and bargaining with RWWPE.

B. *The Evidence*

1. The status of Thomas Kofi

Thomas Kofi commenced his employment with the Respondent on December 27, 1982. Kofi is employed in the Respondent's production department and has been responsible for managing the ''oven area'' and its approximately 15 employees for the past 5 years. The oven area is part of the overall production or baking department, which also includes the mixing area. The mixing area is directed by employee Pedro Garcia, an acknowledged supervisor, while Kofi directs the oven area. In the prior proceedings, Kofi had testified that he, Pedro Garcia, and George Skoutelas, another stipulated supervisor, have the same responsibilities. Kofi reports directly to Plant Manager Eugene Finnegan. Kofi earns $14 an hour while general production workers in the oven area earn between $6 and $8 an hour. Employee Leon Garcia, called as a witness by the General Counsel and the only witness to testify in the instant proceedings, testified that Kofi wore, as part of his work uniform, a coffee colored baseball cap type hat, which only the supervisory employees wear and which is different from that worn by the general production employees.

Kofi is responsible for ensuring the quality of the work performed in the oven area. Under Kofi's direction, employees in the oven area set cake molds into baking racks, place racks into the ovens, determine the proper temperature for baking, unload the racks from the ovens, depan the cake molds for cooking, and transfer the finished cakes to the refrigerator or freezer. As do Plant Manager Finnegan and Supervisor Pedro Garcia, Kofi is responsible for shifting employees from task to task depending on the needs of production. Kofi is also responsible for taking the inventory of baking supplies, and decides when employees in the oven area can take breaks, including lunch, based on his staffing needs and the pace of production. Subject to Finnegan's approval, Kofi makes the decision about when employees in the oven area can leave for the day. When Finnegan is not present Kofi makes the decision independently. Although employees usually call Finnegan when reporting illnesses, sometimes they call Kofi who then notifies Finnegan. Kofi spends a good part of his time walking around the plant floor and overseeing production. When not performing the above duties, Kofi helps with the hands-on work of baking cheesecakes. Additionally, while Kofi does not have the authorization to recommend employee raises, Finnegan who does, generally will ask Kofi for his opinions concerning an employee's performance.

Kofi arrives at work at 7 a.m., before Finnegan does, and usually does not leave work until 7 or 8 p.m., although he is not required to leave at any set time. Kofi is the only employee, besides Supervisor George Skoutelas, who has the keys to the plant and the lockers containing the employees uniforms.

Kofi also plays a role in the discipline of employees by bringing any problems to the attention of Finnegan. Kofi is also one of six individuals authorized to sign disciplinary warning notices as a witness. While Finnegan testified at the contempt proceeding that Kofi does not have the authority to fire employees, he had previously testified under oath at an unemployment hearing that Kofi did have the authority to fire employees. In all actuality, Kofi has never fired an employee, only Finnegan has done so regarding employees from the oven area.

In January 1994, when employee Marcos Andrade refused to sign an authorization card for RWWPE at Kofi's request, Kofi suspended him for 2 days. In June 1994, after employee William Orellano refused to return to the oven on Kofi's direction, Kofi issued a warning notice to Orellano and signed it as ''supervisor.'' These actions by Kofi were taken without clearance from Finnegan. Moreover, employee Leon Garcia testified that if an employee failed to follow Kofi's directions, he would be given a warning. Garcia related that Kofi had issued warnings to him and described an incident in November 1994 when this had occurred.

Kofi describes his position as a ''working supervisor'' and is considered to be a supervisor by both employees and management. In fact Finnegan has referred to Kofi as a ''supervisor.'' In one instance employee Jesus Robles asked Kofi for a break and Kofi told him to wait a few minutes until the cakes on the line had been depanned. Robles responded that no one was going to stop him and told Kofi, ''If you want to fire me, fire me.'' Finnegan discharged Robles for insubordination for ''refusing to follow orders from his supervisor,'' whom Finnegan identified to be Kofi.

Leon Garcia testified that Kofi's responsibilities have not changed since Garcia began working for the Respondent in 1991, and Kofi acknowledged that his duties had not changed over the 5-year period that he has been a supervisor.

2. Kofi solicits authorization cards in April 1993 on behalf of RWWPE

In early April 1993, just prior to the Respondent discontinuing its negotiations with Local 810, Kofi began to solicit authorization cards from the Respondent's employees for RWWPE during working hours and at the Respondent's plant facility. Kofi spoke to Leon Garcia, known to be a fervent supporter of Local 810, and asked him on several occasions in April 1993 to sign an authorization card for RWWPE. Kofi told Garcia that it was ''very necessary'' that he sign the authorization card because if Garcia signed it, other employees would also do so. On one occasion, Kofi threatened that if Garcia did not sign an authorization card for RWWPE he would apprise Mario D'Aiuto, Respondent's owner, of this implying this would be to Garcia's detriment. Kofi also offered Garcia a $1-an-hour wage increase if he signed the card and that this would eliminate all his problems with the Respondent.

On April 6, 1993, Kofi approached Garcia in the presence of employees Juan Ramos and Edizon Astudillo and told him that it was his last chance to sign the card and if he failed to do so he would have no further work by the following day. Garcia asked if what Kofi offered him was still applicable if he signed a card for RWWPE and when Kofi said yes, Garcia signed an authorization card for RWWPE. Kofi also told Garcia that he should not keep up this silliness about Local 810 because D'Aiuto would never let Local 810 in, that he would prefer to close down the factory instead.

Kofi also spoke to employees Ramos and Astudillo about signing cards for RWWPE. Kofi threatened that if Ramos did not sign the card he would lose his job. Ramos then signed the authorization card for RWWPE. Kofi advised Astudillo that RWWPE would provide better salary, health insurance and other benefits and that ''anyway you have to sign it because everyone is going to sign it.'' Kofi stated that RWWPE was the Union that D'Aiuto wanted, and ''if the boss wants that union, what are you going to do if you don't sign?'' Astudillo signed an authorization card on April 6, 1993, when Kofi told him that it was his last chance to sign the card.

Kofi also spoke to employee Nicholas Martinez and told him not to bother with Local 810 because D'Aiuto wanted RWWPE and would not sign a contract with Local 810. Kofi also told Martinez that employees who failed to sign authorization cards for RWWPE would not be eligible for benefits when the Union came in and that if Martinez signed a card for RWWPE he would get medical and dental benefits.

On April 6, 1993, Ramos, Astudillo, and Martinez signed authorization cards for RWWPE. Martinez took his signed card directly to D'Aiuto's office and put it on his desk, in order to ''make him happy.'' While D'Aiuto was present in his office at the time he did not offer any comment.

Also in April 1993, employee Marcelino Sierra observed Kofi distribute an authorization card to an Indian employee. When Sierra asked him about this Kofi responded that D'Aiuto did not want Local 810, but wanted RWWPE, and that Local 810 was a Mafia organization. Employee Jaime Santos witnessed Kofi giving authorization cards to Leon Garcia, Angel Valentin, and Juan Ramos, while they were working. Jose Romero observed Kofi give a card to Aleyda Lozano at her machine and saw Lozano sign it.

Kofi, who did not testify at either the contempt proceeding nor the unfair labor practice hearing, gave a deposition to a Board agent on April 28, 1994, in which he denied distributing any authorization cards to employees in 1993, and also denied that his handwriting appeared on any of the RWWPE April 1993 authorization cards. However, an independent handwriting analysis by the Federal Bureau of Investigation demonstrated that Kofi had filled in portions of the authorization cards for employees Chicel Peguero, Magulam Rabbani, Sanawo Sidi, George Skoutelas (an acknowledged supervisor), Angel Valentin, Tarek Elsaid, Ana Gonzales, Abdul Karim, Michael Agjei, Rosa Reymose, and Louis Caraca.

Kofi asserts that employee Chateram Ramdeo was the one who distributed authorization cards for RWWPE in April 1993. Ramdeo denied this alleging that he received the authorization card he signed in April 1993 from Kofi, and that he only solicited employees to sign cards in January 1994.

In a letter dated April 19, 1993, RWWPE advised the Respondent that it had received signed authorization cards from a majority of the Respondent's employees and enclosed were copies of 45 signed authorization cards. The Respondent canceled a bargaining session with Local 810 scheduled for April 13, 1993, and although Local 810 requested that the Respondent continue negotiations by letters dated June 7 and 10, 1993, no further negotiations have occurred.

3. Kofi solicits authorization cards in January 1994 for RWWPE

Kofi continued to solicit cards for RWWPE in 1994. In January 1994, Leon Garcia witnessed Kofi instruct employee Marco Andrade to sign an authorization card for RWWPE in order to avoid unspecified future problems. When Andrade requested that Kofi tell him the benefits of signing with RWWPE and Kofi did not, Andrade said that he would not sign and that what Kofi was doing was illegal. Kofi then suspended Andrade for 2 days, denying Andrade's request to speak to Finnegan and threatening that Andrade would ''never work here again'' if he did not leave the factory right then.

Also in January 1994, Kofi promised employee Luis Chaca that if he signed an authorization card for RWWPE, that the Union would pay some of his outstanding medical bills. Kofi also threatened to withhold Chaca's paycheck if he refused to sign the card at a later date. However, Chaca did not sign the card. In January 1994, employee Santiago Torrez observed Kofi distributing authorization cards for RWWPE to employees Angel Valentin, Jose Diaz, Shakil Ahmed, Norma Vanentin, Joseph Watson, James Robinson, and Zaky Habib. Leon Garcia also saw Kofi hand an RWWPE card to employee Freddie from Bangladesh. Kofi denied in his aforementioned deposition that he gave authorization cards to these employees to sign for RWWPE or that he had any conversations with employees about that Union. Kofi also denied that his handwriting appears on the authorization cards of employees Angel Valentin, Zaky Habib, or Freddy Zorilla. However, the FBI handwriting analysis concluded that Kofi's handwriting is on portions of each of the cards of these three employees.

Chateram Ramdeo, in a deposition given to a Board agent on April 28, 1994, stated that he distributed authorization cards for RWWPE to employees in January 1994. After collecting the signed cards, Ramdeo turned them over to RWWPE. The Respondent and RWWPE appeared before Arbitrator George Sabatella to assess the validity of the cards. Ramdeo told Sabatella that he had personally observed the employees sign the authorization cards. After comparing signatures on the authorization cards with the signatures on each employees W-4 form, Sabatella certified that RWWPE represented a majority of the Respondent's employees. Sabatella acknowledged that he never inquired about how the cards were obtained.

Leon Garcia testified that Kofi's solicitation of authorization cards also occurred in March and April 1994. In March 1994, Kofi told him that he would receive a $1-an-hour increase in salary and additional medical and dental benefits if he signed an authorization card for RWWPE. Garcia asked to see the contract but Kofi said that he would only show him the contract after Garcia signed the card. Kofi also told Garcia that he should sign the card to avoid problems, because ''we will never sign for Local 810,'' but Garcia still refused to sign the card. According to Garcia, Kofi again approached him at the ovens in March and April 1994 and asked him to sign a card for RWWPE. When Garcia refused, Kofi responded, ''You are the kind of person that they don't want . . . in the company. You should sign and avoid problems.'' Garcia related that Marco Andrade was present when this conversation occurred and that Kofi also asked Andrade to sign an authorization card for RWWPE, but that Andrade

refused. When Kofi once more approached Garcia and asked him to sign a card, Garcia refused and Kofi told him, ''Okay, I'm going to tell Mario [D'Aiuto] again. . . . Understand that Mario will never sign. He prefers to close the business than to sign with 810.''

On cross-examination, however, Garcia's testimony regarding the dates in March and April 1994, when Kofi solicited him to sign an authorization card for RWWPE, was confusing and Garcia acknowledged a difficulty in now remembering when these had occurred. Garcia attributed this confusion to the fact that Kofi had asked him to sign a card constantly and he did not therefor have dates clear in his mind. For example, previously Gracia had testified that Andrade was suspended by Kofi in January 1994, while at the hearing he stated that this took place in March 1994. He then admitted that he could not clearly recall which was correct. Also, he justified his failure to remind Kofi in 1994 when asked to sign an authorization card for RWWPE, that he had signed one in 1993, that Kofi did not ask him about this, and that he had forgotten having signed the card in 1993.

4. The suspension of Leon Garcia

During March and April 1994, employees were told not to come to work on days when there was little or no production work to be done. On the morning of Thursday, April 14, 1994, Leon Garcia asked Kofi if there was any work for him the next day and Kofi answered, ''No.'' That afternoon, when the employees were finishing their work, Kofi asked Garcia if he wanted to come in tomorrow and ''clean racks.'' Garcia said, ''Look, if I can, I'm going to come.'' Kofi replied, ''all right.'' On April 25, 1994, Garcia attempted to call Kofi to tell him that he would not be coming to work that day. However, the line was busy and Garcia could not get through.

On Monday, April 18, 1994, when Garcia arrived at work, Kofi told him that he was suspended for 2 days because he had failed to come to work the past Friday. Garcia explained to Kofi that he had advised Kofi that he would come to work if able to do so, but would not if he could not. Kofi just responded that he was suspended and gave him a suspension notice. Garcia testified that on that Friday, April 15, 1994, only 3 or 5 employees out of 15 who worked in the oven area reported for work that day and, of those who did not, no one else besides Garcia had been suspended. Garcia returned to work on Wednesday, April 20, 1994, and on Thursday, April 21, 1994, Garcia was told by Kofi that there was no work for him on Friday, April 22, 1994. Garcia added that on that Friday, all the employees in the oven area worked except him.

C. *Analysis and Conclusions*

1. The supervisory status of Thomas Kofi

Section 2(11) of the Act provides:

> The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with ''genuine management prerogatives'' should be considered supervisors, and not ''straw bosses, leadmen, set-up men and other minor supervisory employees.'' S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

The status of supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co*., 175 NLRB 142 (1969); *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 fn. 13 (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *NLRB v. Bergen Transfer & Storage Co*., 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985); *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981). Indeed, as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), ''Regardless of the specific kind of supervisor authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.'' Thus, the exercise of some supervisory authority in ''a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks,'' the test must be the significance of his judgment and directions. *NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp*., 254 NLRB 433 (1981). Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac*, supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for, ''the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act.'' *Advance Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331 (1st Cir. 1958). In short, ''some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former.'' *Advance Mining Group*, supra, *NLRB v. Security Guard Service*, 384 F.2d 1 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a ''supervisor'' within the meaning of the Act, rests on the party alleging that such status exists. *RAHCO, Inc*., 265 NLRB 235 (1983); *Tucson Gas & Electric Co*., 241 NLRB 181 (1979). Where the possession of any one of the aforementioned powers is not conclusively established, or ''In borderline cases'' the Board looks to well-established secondary indicia, including the individual's job title or designation as a supervisor, attendance at supervisorial meetings, job responsibility, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees. *NLRB v Chicago Metallic Corp*., 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan*, 237 NLRB 844 (1978); and *Flexi-Van Corp*., 228 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J. C. Brock Corp*., 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 261 NLRB 620 (1982).

The consolidated complaints allege that Thomas Kofi is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent acting on its behalf. The Respondent denies these allegations.

The record evidence discloses that Kofi responsibly directs the work of approximately 15 employees in the oven area. *Superior Bakery*, 893 F.2d 493 (2d Cir. 1990). Kofi appears to exercise independent judgment in shifting employees from task to task depending on the needs of production, in evaluating the quality of the work performed, and in determining when employees may leave for breaks or lunch. *Earle M. Jorgenson Co*., 240 NLRB 1296 (1979). If employees take breaks without clearance from Kofi, they are disciplined, often by Kofi himself, and at least one employee has been discharged for doing so. In her findings of fact, Chief Magistrate Judge Buchwald found that Kofi has the authority to recommend to Plant Manager Finnegan when employees should be permitted to leave for the day, and when it is necessary to work overtime. If Finnegan is unavailable, Kofi may make this decision independently. However, according to the subsequent testimony of Garcia given here, Kofi has the independent authority to schedule employees based on his assessment of the production needs of the Respondent. When Garcia asked Kofi whether he had to report to work on a day in which there was going to be little or no production work, Kofi first told him that there was no work the next day, but then told him that he could report to work to clean the racks. Kofi also told Garcia the next Friday that he should not report to work. The Respondent provided no evidence that Kofi was told by anyone how to schedule employees on these days, or that he had to clear his decision with Finnegan or anyone else. *NLRB v. Porta Systems Corp*., 625 F.2d 399 (2d Cir. 1980).

Moreover, the General Counsel asserts that Kofi also has the authority to discipline employees. In her Findings of Fact, Chief Magistrate Judge Buchwald found that Kofi brought disciplinary problems to Finnegan's attention in the past and had on ''two recent occasions'' taken independent disciplinary action, once suspending an employee, for 2 days and the other time issuing a warning letter that was signed by him above the title ''supervisor,'' but that there was no proof that Kofi had the authority to effectively recommend that disciplinary action be taken once the disciplinary problem was brought to Finnegan. She also found that while Kofi had taken independent disciplinary measures against employees, there was nothing to suggest that he had the authority to do so, and anyway, Finnegan denied that Kofi had such authority. I question this since subsequent testimony in these proceedings by Garcia shows that Kofi independently disciplined employees on other occasions, aside from the two instances listed by Judge Buchwald, and without prior clearance from Finnegan. Furthermore, I do not give any real weight to Finnegan's denial of such authority.[3]

While there is a shadow of a doubt as to whether the evidence in this case conclusively establishes that Thomas Kofi is a supervisor within the meaning of Section 2(11) of the Act, because he possesses one of the primary powers listed in the Act, in ''borderline cases'' the Board will consider secondary indicia of supervisory status and in this respect, there is no doubt that the secondary indicia in this matter clearly support a finding that Kofi is a supervisor under the Act. *HS Lordships*, supra. In the instant case the evidence shows that Kofi is considered a supervisor by management, the employees and by himself as well. *Helena Laboratories Corp*., 225 NLRB 257 (1976). Several employees testified that Kofi was their supervisor. When employee Robles refused to follow Kofi's command that he not take a break, Finnegan discharged him for insubordination to his supervisor, meaning Kofi. Moreover, Kofi in his deposition stated that he performed the same work as stipulated supervisor Pedro Garcia and George Skoutelas. Also, Finnegan has referred to Kofi as a supervisor.

Moreover, Kofi is the only employee besides Supervisor Skoutalas who has keys to the plant and the lockers containing the employees' uniforms. *Thriftway Supermarket*, 276 NLRB 1450 (1985). Additionally, Kofi is paid a substantially higher hourly rate than the other general employees. *DST Industries*, 310 NLRB 957 (1993). Kofi wears as part of his employee uniform a coffee colored baseball type cap which is only worn by the other supervisory employees and is different from the type worn by the general production employees. Finally, Kofi stated in his deposition that while Pedro Garcia (a stipulated supervisor) was in charge of the mixing area, Kofi was in charge of the oven area and they perform the same duties. This was uncontradicted. If Kofi is not a supervisor than it would leave a group of 15 employees in the oven area without a supervisor, while the employees in the mixing area of equivalent size had 1. *Iron Mountain Forge Corp*., 278 NLRB 255 (1986).

In support of its argument that Thomas Kofi is not a supervisor within the meaning of Section 2(11) of the Act, the Respondent relies on *J. C. Brock Corp*., 314 NLRB 157 (1994). As does Chief Magistrate Judge Buchwald, I must acknowledge that, at first glance the distinction between *J. C. Brock* and the present case is a close one. However, consider that in *J. C. Brock*, the position ''Line Coordina-

[3] In his deposition entered into evidence at the contempt hearing Finnegan stated that Kofi did not have the authority to fire employees, but testified under oath at an unemployment hearing that Kofi did have such authority. This leads me to believe that Finnegan's testimony was designed and given mainly in consideration of what was in the best interests of the Respondent rather than for the truth of the matter. However, it is clear that Kofi does not have the authority to fire or hire employees.

tor'' was in effect that of assistant to the production supervisor on the ''pack'' or ''prep'' lines who actually had the responsibility for the operation of those lines. The production supervisors worked on or near the production area along with the line coordinators and were readily available as well as present. In the instant case Kofi as well as the stipulated supervisors in charge of the other production area manage their respective operations directly subordinate only to the overall Plant Manager Finnegan. Moreover, there was no admission by the employer in *J. C. Brock*, as here, that employees performing the same duties as the alleged supervisor were supervisors. Finally, the Board in *J. C. Brock* concluded that the line supervisors possessed none of the secondary indicia of supervisory status which exist in the instant case and make it a stronger one than *J. C. Brock* for finding supervisory status.

From all the above I find and conclude that Thomas Kofi is a supervisor within the meaning of Section 2(11) of the Act.

Even assuming arguendo that the record does not support a finding that Thomas Kofi is a supervisor under Section 2(11) of the Act, I do find that there is sufficient evidence to conclude that Kofi was clearly acting as an agent of the Respondent as defined in Section 2(13) of the Act. Section 2(13) of the Act states:

> In determining whether any person is acting as an ''agent'' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Under Board law, the test for agency is whether, under all the circumstances, employees would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *House Calls, Inc*., 304 NLRB 311 (1991); *Lovila Coal Co*., 275 NLRB 1358 (1985).

Here, Kofi clearly had apparent authority to act for the Respondent. As the General Counsel points out, in this regard, the Respondent's previous history before the Board is significant. Not only are the parties the same, but Kofi's statements to employees were almost exactly the same as those made by the Respondent's owner, Mario D'Aiuto, his son, and Jose Soto at the outset of Local 810's organizing campaign in 1991. *Baby Watson Cheesecake*, 309 NLRB 417 (1992). There the Board concluded that Soto, who was only a rank-and-file employee of the Respondent, was nevertheless its agent when he solicited cards for RWWPE and threatened employees. Id. at 422. As both the parties and the behavior in the instant case were identical to those in the first case, it is certainly reasonable that employees would conclude that Kofi was acting on behalf of the Respondent in a recurring attempt to coerce employees to select RWWPE as their Union.

Moreover, the record indicates that Kofi held himself out as acting for the Respondent. Kofi's solicitations occurred at the plant and took place during working hours, which in and of itself is a significant indication that he was acting for the Respondent. *Dentech Corp*., 294 NLRB 924 (1989). When soliciting for RWWPE, Kofi stated that it was the Union that D'Aiuto wanted and that D'Aiuto would never sign a bargaining agreement with Local 810. He also threatened employees that if they refused to sign authorization cards for RWWPE he would apprise D'Aiuto of this. Kofi promised the employees that if they did sign cards for RWWPE they would receive raises and would have no more problems with the office. These statements made it appear that Kofi was acting as a conduit for D'Aiuto. *Storer Communications*, 294 NLRB 1056 (1989). Based on these statements employees could reasonably conclude that Kofi was acting under the apparent authority of the Respondent. Under all the circumstances, I find and conclude that Kofi was an agent of the Respondent acting on its behalf at all times material.

2. The alleged violations of Section 8(a)(1) and (2) in 1993

The complaint in Case 2–CA–26479 alleges that the Respondent in or about April 1993, promised employees better benefits if they signed authorization cards for RWWPE, threatened that the employees' support of the Union would be futile because the Respondent's president would never sign a contract with the Union, and rendered assistance and support to RWWPE, in violation of Section 8(a)(1) and (2) of the Act. The Respondent denies these allegations.

The evidence in the entire record shows that throughout April 1993, Kofi, found to be a supervisor and agent of the Respondent, distributed authorization cards for RWWPE to employees during working hours at the Respondent's plant in clear violation of Section 8(a)(1) and (2) of the Act and I so find. Although in his deposition Kofi denied handing out the cards, an FBI handwriting report shows that Kofi's handwriting appears on at least 14 of the authorization cards. Moreover, several employees testified that Kofi gave them authorization cards and that they saw him distribute cards to other employees. Chief Magistrate Judge Buchwald also made the same finding which the Respondent does not contest. Kofi promised benefits to employees for signing authorization cards for RWWPE, including a $1 raise, eliminating employee's problems with the office, better salaries, and better health benefits. It is well settled that an employer who promises higher wages and better benefits if employees choose one union over another restrains employees in the exercise of their Section 7 rights and violates Section 8(a)(1) and (2) of the Act. *Baby Watson Cheesecake*, 308 NLRB 417 (1992); *Christopher Street Corp*., 286 NLRB 253 (1987).

Kofi also made both specified and unspecified threats to employees if they failed to sign cards for RWWPE, that they would lose their jobs, that he would report them to D'Aiuto, and that they would not be eligible for benefits when RWWPE came in unless they signed a card. Threats that employees must sign a card for a specific union or be discharged or will not be allowed to work violates Section 8(a)(1) and (2) of the Act. *Baby Watson Cheesecake*, supra; *Jayar Metal Finishing Corp*., 297 NLRB 603 (1990). Moreover, Kofi threatened that it would be futile for the employees to select Local 810 as their bargaining representative because the Respondent would never sign a contract with that Union. An employer's threat that it would be futile for employees to select a union as their bargaining representative because the employer would never sign an agreement with that union violates Section 8(a)(1) of the Act. *Wellstream Corp*., 313 NLRB 698 (1994).

Additionally, Kofi threatened that unless employees chose RWWPE to represent them but selected Local 810 instead,

the Respondent would close the plant before signing a bargaining contract with Local 810. This constitutes unlawful interferences with employee rights and violates Section 8(a)(1) of the Act. *Brown Transportation Corp*., 296 NLRB (1989). Threats of unspecified reprisals for exercising Section 7 rights are also prohibited under Section 8(a)(1) of the Act. *Equitable Gas Co*., 303 NLRB 925 (1991). Finally, an employer's assistance to a labor organization by soliciting authorization cards is a violation of Section 8(a)(1) and (2) of the Act and the Respondent's myriad threats and promises by Kofi soliciting authorization cards for RWWPE violated these sections of the Act as well. *United Artists Communications*, 280 NLRB 1056 (1986).

3. The alleged violations of Section 8(a)(1) and (2) in 1994

The complaint in Case 2–CA–27450 alleges that in or around ''March and April 1994, more precise dates being presently unknown to the General Counsel,'' the Respondent promised employees better benefits if they signed authorization cards for RWWPE, threatened employees with unspecified reprisals and being reported to Respondent's president if they refused to sign a card for RWWPE, and also rendered assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE in violation of Section 8(a)(1) and (2) of the Act. The Respondent denies these allegations.

Leon Garcia testified that on at least three occasions in March and April 1994 Kofi again asked him to sign an authorization card for RWWPE promising him medical and dental benefits and a raise in pay if he agreed, and on another occasion threatened him that if he refused to sign the card for RWWPE this would be reported to D'Aiuto and he better sign the authorization card to avoid problems.

The Respondent asserts that Garcia's testimony is contradictory to his testimony at the contempt proceeding and possibly perjurious. Although it is clear that Garcia, on cross-examination, was confused as to the dates of threats and solicitations, he explained that this was because Kofi had on many occasions attempted to get him and other employees to sign authorization cards on behalf of RWWPE and it was therefore difficult to keep dates clear in his mind. I credit the testimony of Leon Garcia despite this. Garcia testified in an otherwise straightforward manner, accurately and consistently without rebuttal from any live witness that Kofi solicited cards for RWWPE and threatened and made promises to Garcia and other employees to sign the cards. Also, Garcia's affidavit, given to a Board agent in May 1994, soon after the events he testified to reflects his memory of events in 1994 when apparently still clear in his mind and form a prior consistent statement with his testimony that the events occurred in March and April 1994.

Even assuming that Garcia was mistaken as to the dates of the threats and solicitations, he still clearly testified with corroboration from other employees to a series of threats, promises, and solicitations throughout April 1993 and into January 1994, and the substance of the testimony of Garcia and other employees was uncontroverted at the contempt proceeding or in the instant hearing. Moreover, although the Respondent argues that Garcia's testimony may put at question Chief Magistrate Judge Buchwald's findings of fact and conclusions of law, these recommended findings were based on the uncontroverted testimony of seven additional employees and an FBI agent who testified that authorization cards submitted by RWWPE, had on some of them the handwriting of Thomas Kofi found to be a supervisor. Therefore, even without the testimony of Leon Garcia, it is uncontroverted that the Respondent engaged in a litany of 8(a)(1) and (2) violations of the Act.

Based on the above, I find and conclude that the Respondent violated Section 8(a)(1) of the Act when it promised better benefits to its employees if they signed authorization cards for RWWPE (*Baby Watson Cheesecake*, supra), and threatened employees with specified and unspecified reprisals and being reported to the Respondent's president if they refused to sign a card for RWWPE. The Respondent also violated Section 8(a)(2) of the Act when it unlawfully rendered assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE. *Baby Watson Cheesecake*, supra.

4. The suspension of Leon Garcia

The complaint in Case 2–CA–27450 alleges that the Respondent suspended employee Leon Garcia for 3 days, April 18, 19, and 22, 1994, because Garcia refused to sign an authorization card for RWWPE and in order to unlawfully encourage employees to sign cards for RWWPE, a union favored by the Respondent, thereby discriminating against him in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies this allegation.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate ''in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'' Under the test announced in *Wright Line*, 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of proving unlawful motivation, then the employer may avoid being held in violation of Section 8(a)(1) and (3) of the Act only if it can show that ''the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).[4] However, when an employer's stated motive for its actions are found to be false, the circumstances may warrant an inference that it is pretextual and that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960); *Electromedics, Inc*., 299 NLRB 928 (1990). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co*., 285 NLRB

[4] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co*., 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d (8th Cir. 1990).

1981 (1987); and *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (9th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

In establishing a prima facie case of unlawful motivation as the first part of the *Wright Line* test, the General Counsel is required to prove not only that the employer knew of the employee's union activities or sympathies, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was antiunion animus to ''link the factors of timing and knowledge to the improper motivation.'' *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1998).

In the instant case, the evidence clearly establishes that Leon Garcia was one of the primary supporters of Local 810 and that the Respondent knew of Garcia's continuous support of the Union. For example, in the Respondent's October 31, 1994 letter brief to the United States Court of Appeals, Second Circuit, setting forth its position in the contempt proceeding, *NLRB v. Baby Watson Cheesecake*, Case 93-4023, the Respondent refers to Garcia as the ''lead man of Local 810,'' and Kofi told Garcia that if he signed an authorization card for RWWPE everyone else would sign implying that Garcia was the leader in supporting Local 810. Moreover, the record of both this proceeding as well as the prior proceedings before the Board is replete with evidence of the Respondent's animus towards Local 810. The Respondent on several occasions threatened to close its plant if Local 810 came in and that the Respondent's president, D'Aiuto, would never sign a contract with Local 810.

Moreover, the Respondent was aware of Garcia's refusal to sign a card for RWWPE. In this regard, on various occasions Garcia was told that it was his last chance to sign an authorization card for RWWPE and that he would be unable to work unless he signed the card. Thus, there is also evidence in the record of the Respondent's animus towards Garcia for supporting Local 810 over RWWPE leading to his suspension.

Since there is clear evidence in the record as a whole, that the Respondent knew of Garcia's support for Local 810, that the Respondent harbored antiunion animus and since Garcia's suspension occurred in close proximity to his latest refusal to sign an authorization card for RWWPE and his continued support for Local 810, the General Counsel by a preponderance of the evidence, has established a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the Respondent's decision to suspend Leon Garcia and was discriminatorily motivated. *Wright Line*, supra; *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

In order to rebut the General Counsel's prima facie case, the Respondent must show that it would have suspended Garcia even in the absence of his union activities and support. The Respondent has the burden of presenting ''an affirmative defense in which the employer must demonstrate by a preponderous of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Equitable Gas Co*., 303 NLRB 925 (1991); *Chelsea Homes*, 298 NLRB 313 (1990).

Garcia testified that on April 14, 1994, he was initially told not to come to work the next day Friday, April 15, 1994, presumably because there was little or no production scheduled for that day. Later that same day Kofi asked Garcia if he wanted to work on Friday, April 15, 1994, cleaning racks. Garcia responded that if he could he would come to work. Kofi indicated that this was acceptable. There is nothing in the record to suggest that Kofi had directed Garcia to come to work the next day. On Friday, April 15, 1994, Garcia called Kofi at the plant to advise him that he was unable to work that day but was unable to get through to Kofi on the telephone. When Garcia appeared for work on Monday, April 18, 1994, he was told by Kofi that he was being suspended for 2 days for not coming to work the previous Friday. Garcia testified that only about 5 of 15 employees actually worked that Friday and no other employees who failed to appear that day for work was suspended.

I assume that the Respondent's defense for its action in suspending Garcia is his failure to appear for work on Friday, April 15, 1994, for it offered no other defense for its actions. Garcia's testimony regarding the incident was unrebutted since the Respondent called no witnesses at the hearing. As Garcia testified, only 5 of the 15 employees in his department went to work on Friday, April 15, 1994, and no one else was suspended or disciplined for there failure to appear for work. The Respondent did not attempt to provide at the hearing evidence to explain this disparate treatment, thus any legitimate basis for the suspension must be discredited as spurious. Because the Respondent has not established that Garcia would have been suspended even if not engaged in protected activities, it has failed to rebut the General Counsel's prima facie case. *Wright Line*, supra.

Garcia also testified that when he finished working on Thursday, April 21, 1994, Kofi told him that there was no work for him the next day, Friday, April 22, 1994. Garcia stated that he learned that all the employees in the oven area except for him worked on April 22, 1994. Again, the Respondent has failed to rebut the General Counsel's prima facie case. The Respondent's alleged reason for not allowing Garcia to work on April 22, 1994, that there was no work for him, is not credible in view of the unrefuted testimony of Garcia that everyone else in the ''oven area,'' except for Garcia worked that day. The Respondent has failed to sustain its *Wright Line* burden to establish that Garcia would not have been allowed to work even if not engaged in protected activities, since all employees except Garcia worked that day. Moreover, the evidence herein raises the inference that the Respondent, through Kofi, ws sending a message to Garcia that he would be punished for failing to sign an authorization card for RWWPE, the Union favored by the Respondent, and for his continued support for Local 810.

Therefore, a preponderous of the evidence on the record establishes the conclusion that Leon Garcia was suspended for 3 days in April 1994 because of his activities on behalf of Local 810 and because of his refusal to sign an authorization card for RWWPE. The Respondent has thereby violated Section 8(a)(1) and (3) of the Act. *United Artists Communications*, 280 NLRB 1056 (1986); *Wright Line*, supra.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully suspended employee Leon Garcia for 3 days, the Respondent shall be ordered to rescind such unlawful suspensions and make Garcia whole for any lose of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be ordered to expunge from its records all references to the unlawful suspension of Leon Garcia and inform him in writing that this has been done and that such unlawful action will not be used against him in any manner in the future. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Baby Watson Cheesecake, Inc., is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions, Local 810, International Brotherhood of Teamsters, AFL–CIO, and Retail, Wholesale, Warehouse and Production Employees International Union, are labor organizations within the meaning of Section 2(5) of the Act.

3. By promising employees better benefits if they signed authorization cards for RWWPE, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening that the employees' support of Local 810 was futile because the Respondent's president would never sign a contract with that Union and that the Respondent would close the plant rather than let Local 810 in, the Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with specified and unspecified reprisals, i.e., employees would not be allowed to work, would not receive or be denied health benefits, or would have trouble with the office, if they refused to sign an authorization card for RWWPE, the Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with being reported to the Respondent's president if they refused to sign an authorization card for RWWPE, the Respondent violated Section 8(a)(1) of the Act.

7. By rendering assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE, the Respondent violated Section 8(a)(1) and (2) of the Act.

8. By suspending Leon Garcia for 3 days because he refused to sign an authorization card for RWWPE, a union favored by the Respondent, the Respondent violated Section 8(a)(1) and (3) of the Act.

9. The unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act includes:

> All production and maintenance employees and shipping employees of the Employer employed at its facility, excluding all clerical employees, and guards, professional employees and supervisors as defined in the Act.

10. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Baby Watson Cheesecake, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees higher wages and better benefits if they signed authorization cards from RWWPE.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening employees that their support of Local 810 was futile because the Respondent's president would never sign a contract with that Union and would close the plant rather than let Local 810 in.

(c) Threatening employees with specified or unspecified reprisals if they refused to sign authorization cards for RWWPE.

(d) Threatening employees with being reported to its Respondent's president if they refused to sign authorization cards for RWWPE.

(e) Rendering assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE.

(f) Suspending employees because they refused to sign an authorization card for RWWPE and in order to unlawfully encourage employees to sign cards for RWWPE, a union favored by the Respondent.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the suspension for 3 days issued to Leon Garcia and make him whole for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision, and expunge from the Respondent's personnel records any references to his suspensions and notify him, in writing, that this has been done and that evidence thereof will not be used as a basis for any future personnel action against him.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order and further to ensure that the terms of the Order have been fully complied with.

(c) Post at its New York City, New York facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT promise employees higher wages and better benefits if they sign authorization cards for RWWPE.

WE WILL NOT threaten employees that their support of Local 810 would be futile because we will never sign a contract with Local 810 and that we will close the plant rather than let Local 810 in.

WE WILL NOT threaten employees with specified or unspecified reprisals if they refused to sign an authorization card for RWWPE or that employees will be reported to Baby Watson Cheesecake's president if they refuse to sign an authorization card for RWWPE.

WE WILL NOT render assistance and support to RWWPE by soliciting and coercing employees to sign authorization cards for RWWPE.

WE WILL NOT suspend employees because they refuse to sign authorization cards for RWWPE.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the suspensions issued to Leon Garcia and make him whole for any loss of earnings or other benefits suffered because of his suspension for 3 days, with interest.

WE WILL remove from our personnel records any and all references to the suspension for 3 days of Leon Garcia and WE WILL notify him in writing that this has been done and that evidence thereof will not be used against him in any other way.

BABY WATSON CHEESECAKE, INC.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''